STATE OF MICHIGAN

COURT OF APPEALS

DONALD E. HOOPER,

Plaintiff-Appellant,

v

RONALD HOOPER, GRANT HOOPER, and BERTHA HOOPER,

Defendants-Appellees.

UNPUBLISHED
February 11, 2003

No. 234111
Sanilac Circuit Court
LC No. 01-027647-CH

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiff Donald E. Hooper appeals by right the circuit court's order granting summary disposition to defendants Ronald, Grant, and Bertha Hooper pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

This appeal concerns plaintiff's continuing dispute with his twin brother, Ronald, and his parents, Grant and Bertha, over the control and use of several jointly owned parcels of property.[1] Plaintiff sought a declaratory judgment from the trial court granting him the sole use and occupancy of approximately one-half of the four jointly owned parcels while granting to Ronald the sole use and occupancy of the remaining property, with each brother being responsible for any taxes associated with his portion.[2] He also sought to have the trial court require the parties to register these parcels with the Farm Service Agency (FSA). He further requested that he be given one-half of the profits received by Ronald for the farming operation allegedly conducted on the four parcels of property in the years 1998, 1999, and 2000. Finally, he requested that the

[1] Other aspects of this on-going dispute have been considered by another panel of this Court in *Hooper v Hooper*, unpublished opinion per curiam of the Court of Appeals, issued February 29, 2000 (Docket No. 221079), and in the pending case of *Hooper v Hooper*, Docket No. 231544.

[2] At the hearing on defendants' motion for summary disposition, plaintiff specifically informed the trial court that he did not seek a partition of the jointly owned property. See, e.g., *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 440; 581 NW2d 794 (1998) (counsel's admission at trial is binding on party).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

trial court order defendants to pay him one-half the fair market rental value of the residences they occupied on the jointly held property during those same years.

We review the grant or denial of a motion for summary disposition de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). However, we review a trial court's decision to award or deny declaratory relief for an abuse of discretion. *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993). The trial court's determination of any underlying legal issues is reviewed de novo. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 271; 568 NW2d 411 (1997).

The trial court granted summary disposition to defendants, ruling that no actual controversy existed between the parties to justify declaratory relief.[3] MCR 2.605(A)[4] provides for the issuance of declaratory judgments in cases involving actual controversies. In order to be entitled to declaratory relief, plaintiff was required to demonstrate the existence of an actual, justiciable controversy. *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). "[B]efore affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, *i.e.*, a plaintiff must allege and prove an actual *justiciable* controversy." *Id.* at 589; see also *Allstate Ins Co*, *supra* at 66.

In the previous appeal in this case, *Hooper v Hooper*, unpublished opinion per curiam of the Court of Appeals, issued February 29, 2000 (Docket No. 221079), a panel of this Court held that the plaintiff and defendants held the property as joint tenants with the right of survivorship.[5] A joint tenancy combines the unities of interest, title, time, and possession. *Albro v Allen*, 434 Mich 271, 274; 454 NW2d 85 (1990). Therefore, "[e]ach joint tenant shares in possession of the entire estate, and each is entitled to an undivided share of the whole." *Id.*

Because plaintiff and defendants jointly own the entire property, they are each entitled to occupy residences on that property without paying their cotenants for the privilege of doing so. *Sullivan v Sullivan*, 300 Mich 640, 644; 2 NW2d 799 (1942); see also *Walton v Walton*, 287 Mich 557, 561; 283 NW 687 (1939). If the cotenants were collecting rent from third parties for the use or occupancy of the property, plaintiff would be entitled to a one-quarter share of the proceeds.[6] MCL 554.138; *Zwergel v Zwergel*, 224 Mich 31, 36-37; 194 NW 505 (1923).

[3] The trial court actually granted summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10).

[4] The court rule provides, in relevant part:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted. [MCR 2.605(A)(1).]

[5] Thus, we note that plaintiff's instant appeal is also subject to the doctrine of res judicata. See *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

[6] Plaintiff has requested that he be paid one-half of the proceeds of Ronald's farming activities and one-half of the fair market rental value of the homes occupied by Ronald, Grant, and Bertha. There are four joint owners and therefore, even if plaintiff were entitled to his fair share of the

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However, plaintiff has not alleged that defendants are renting the residences out to third parties; rather, he acknowledges that they are occupying the residences themselves. Therefore, there was no actual, justiciable controversy regarding the payment of rent on the residences for which the trial court could grant declaratory relief.

With regard to plaintiff's claim that he was entitled to a one-half share of the profits realized by Ronald from the farming operations Ronald allegedly carried out on the entire property for the years 1998, 1999, and 2000, plaintiff makes no claim that he previously objected to Ronald's use of the land, or that Ronald's use was contrary to some agreement between the joint tenants. Plaintiff has not requested a partition of the property and has not alleged that there was an agreement between the cotenants that Ronald would share the profits or pay for his exclusive use of the land. Absent an action to partition jointly held property, an accounting is not required and plaintiff is not entitled to a portion of the profits allegedly realized by Ronald from his farming operation. *Forler v Williams*, 257 Mich 686, 687; 241 NW 823 (1932); *Frenzel v Hayes*, 242 Mich 631, 636; 219 NW 740 (1928); *Moreland v Strong*, 115 Mich 211, 217; 73 NW 140 (1897). Accordingly, he was not entitled to share in the farming profits received by Ronald. *Everts v Beach*, 31 Mich 135, 136-137; 18 AR 169 (1875); *Wilmarth v Palmer*, 34 Mich 347, 348 (1876); *Owings v Owings*, 150 Mich 609, 612; 114 NW 393 (1908). Thus, there was no actual, justiciable controversy with regard to the payment by Ronald of a share of the profits derived from farming the jointly owned property. *Shavers*, *supra*.

Plaintiff fails to cite any authority that would have permitted the trial court to force defendants, as cotenants, to register the property with the FSA. Failure to provide authority in support of a position results in forfeiture of the issue on appeal. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Plaintiff has thus failed to demonstrate that an actual, justiciable controversy existed with respect to registering the property with the FSA.

Plaintiff finally contends that MCL 554.138[7] supports his claim for one-half of the fair market rental value of defendants' homes and to one-half of the profits realized by Ronald from his farming operation on the jointly owned property. We disagree.

As we have indicated, our Supreme Court has held that a cotenant is not entitled to collect rent from another cotenant who occupies jointly owned property. *Sullivan*, *supra*; *Zwergel*, *supra*. Nor, in the absence of an agreement or a partition of the property, is one cotenant entitled to share in the profits obtained by another cotenant's use of jointly owned property. *Forler*, *supra*; *Frenzel*, *supra*; *Moreland*, *supra*. The Court has therefore interpreted MCL 554.138 to apply only to the collection of rent or profit from a third party's rental or use of

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proceeds from the farming operation or the rent, he would only be entitled to a one-quarter share, not one-half.

[7] This statute provides:

> One joint tenant or tenant in common, and his executors or administrators, may maintain an action for money had and received, against his co-tenant for receiving more than his just proportion of the rents and profits of the estate owned by them as joint tenants or tenants in common. [MCL 554.138.]

jointly owned property. We reject plaintiff's invitation to ignore these decisions because of their age; we have no authority to overrule controlling decisions of our Supreme Court. *O'Dess v Grand Trunk W R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

We conclude that the trial court correctly determined that no actual, justiciable controversy existed between the parties. *Allstate Ins Co*, *supra*. Accordingly, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie